

1 MCGUIREWOODS LLP
2 DELEYLA A. LAWRENCE SBN #284562
3 1800 Century Park East, 8th Floor
4 Los Angeles, CA 90067-1501
5 Telephone: 310.315.8200
6 Facsimile: 310.315.8210

7 Attorneys for Defendant Bank of America, N.A.

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 GEORGE B. NOBLE AND PATRICIA
11 L. NOBLE,

12 Plaintiffs,

13 vs.

14 CALIBER HOME LOANS, INC.; U.S.
15 BANK TRUST, N.A. AS TRUSTEE
16 FOR LSF9 MASTER
17 PARTICIPATION TRUST; LSF9
18 MORTGAGE HOLDINGS, LLC;
19 CLEAR RECON CORP.; BANK OF
20 AMERICA, N.A.; and DOES 1-10,
21 INCLUSIVE,

22 Defendants.

CASE NO. 4:17-CV-01053-CW

**DEFENDANT'S REPLY IN
SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFFS'
COMPLAINT**

Date: June 13, 2017
Time: 2:30 p.m.
Crtrm.: 2

1 **I. INTRODUCTION**

2 Defendant Bank of America, N.A. ("BANA") submits the following Reply to
3 Plaintiffs George and Patricia Noble's ("Plaintiffs") Opposition to its Motion to
4 Dismiss the Complaint.

5 **II. LEGAL ARGUMENT**

6 **A. Plaintiffs' Claims Are Barred by Res Judicata**

7 In their Opposition, Plaintiffs argue that res judicata is not appropriate here
8 because "[n]either the facts nor the primary rights at issue in [the Prior Action] are
9 identical to those raised in Plaintiffs' present claims." Opp. 7:8-9. Plaintiffs do not
10 challenge BANA's position that both a final judgment on the merits and the
11 requisite privity exists, and thus concede that those arguments are meritorious. *See*
12 *generally*, Opp; *see Herzberg v. County of Plumas*, 133 Cal. App 4th 1, 20 (2005);
13 *Moulton Niguel Water Dist. v. Colombo*, 111 Cal. App. 4th 1210, 1215 (2003) (a failure
14 to challenge a party's argument in an opposition operates as an admission that the
15 argument is meritorious.). Indeed, Plaintiffs' only argument against BANA's res
16 judicata defense is that the requisite identity of claims does not exist. However, that
17 is not the case.

18 As admitted by Plaintiffs, the Prior Action involved foreclosure commencing
19 on the subject Property. Specifically, Plaintiffs argue that the Prior Action was
20 based on "Defendants dual track[ing] their loan by continuing to proceed with
21 foreclosure proceedings on Plaintiffs' home." Opp. 7:3-5. Indeed, the Prior Action
22 challenged foreclosure proceeding related to the same Loan secured by the same
23 Property. RJN, Ex. B-C; *see generally*, Compl. As such, both actions involve
24 similar facts. Regardless, all of Plaintiffs' allegations in the Complaint, aside from
25 the alleged recording of the most recent Notice of Trustee's Sale against the
26 Property, took place *prior* to Plaintiffs filing the Prior Action in August 2015. RJN,
27 Exs. B-C; *see generally*, Compl. The Assignment that forms the basis of Plaintiffs'
28 instant claim against BANA for violation of California Civil Code Section 2924.17

1 is dated November 6, 2014, and the qualified written requests (“QWR”), that form
2 the basis of their instant claim against BANA for violation of the Real Estate
3 Settlement Procedures Act (“RESPA”), were allegedly sent to BANA on November
4 7, 2014.¹ Compl., ¶¶ 21, 37, 44. In fact, Plaintiffs’ complaints in the Prior Action
5 even discuss the November 6, 2014 Assignment. RJN, Exs. B-C; *see generally*,
6 Compl; Opp. 10:10-23. “California recognizes that the doctrine of *res judicata* will
7 bar not only claims actually litigated in a prior proceeding, but also claims that
8 could have been litigated” in the prior suit. *See Palomar Mobilehome Park Ass’n v.*
9 *City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993); *see also Busick v.*
10 *Workmen's Compensation Appeals Bd.*, 7 Cal. 3d 967, 975 (1972) (“[P]rior
11 judgment is *res judicata* on matters which were raised or could have been raised, on
12 matters litigated or litigable”). Accordingly, Plaintiffs were aware of the facts
13 alleged against BANA in the instant action before they even filed the Prior Action.
14 Thus, the same claims alleged here certainly could have been raised therein. For
15 these reasons and those discussed in BANA’s Motion, this action should be
16 dismissed as it is barred by the doctrine of *res judicata*.

17 **B. Plaintiffs’ Claim for Violation of the Real Estate Settlement**
18 **Procedures Act Fails**

19 In support of their RESPA claim, Plaintiffs argue that their QWR “identified
20 the borrower’s name and account, provided sufficient detail to BANA regarding the
21 information Plaintiffs were seeking and also sought information related to the
22 servicing of the loan...” Opp. 9:1-4. Based on this contention, Plaintiffs conclude
23 that their “request clearly met the requirements for a QWR...” *Id.*, at 9:4-5.
24 However, as an initial matter, this argument fails because Plaintiffs impermissibly
25 attempt to add new allegations in their Opposition. Plaintiffs did not include these
26 allegations in the Complaint, and thus their claim fails for this reason alone. *See*

27 _____
28 ¹ Plaintiffs only bring two causes of action against BANA for violation of RESPA and violation of Section 2924.17.
See generally, Compl.

1 *generally*, Compl. Regardless, under RESPA, loan servicers have a duty to respond
2 to a borrower's inquires relating to information about the borrower's loan upon
3 receipt of a QWR from the borrower. 12 U.S.C. 2605(e)(1)(A). For purposes of
4 RESPA, a QWR is defined as:

5 [A] written correspondence, other than notice on a payment coupon or other
6 payment medium supplied by the servicer, that— (i) includes, or otherwise
7 enables the servicer to identify, the name and account of the borrower; and
8 (ii) includes a statement of the reasons for the belief of the **borrower**, to the
9 extent applicable, that the account is in error or provides sufficient detail to
10 the servicer regarding other information sought by the borrower. 12 U.S.C.
11 2605(e)(1)(B)(emphasis added).

12 Here, Plaintiffs allege no facts showing that they sent a written request to
13 BANA that meets the requirements of a QWR. *See generally*, Compl. Plaintiffs fail
14 to attach any purported QWR to their Complaint. *Id.* Indeed, Plaintiffs merely list
15 what BANA failed to provide in response to their requests. Compl., ¶¶ 21-22, 37.
16 Since Plaintiffs do not plead any facts to demonstrate that their requests met the
17 requirements for a QWR, then the cause of action must be dismissed. *Schuck v.*
18 *Fannie Mae*, 2011 U.S. Dist. LEXIS 69257, 21-23 (E.D. Cal. 2011); *Wilson v.*
19 *Chase Home Fin.*, 2011 U.S. Dist. LEXIS 126988, 6-7 (C.D. Cal. 2011). Merely
20 alleging that a demand was made without attaching the demand is a failure to plead
21 a claim under RESPA. *See id.*

22 Additionally, Plaintiffs quote 12 U.S.C. 2605(f) and conclude that based on
23 this language, there is "a private right of action for borrowers for servicer violations
24 under the provision of this statute." Opp. 9:11-17. However, Plaintiffs' conclusory
25 assertion is not sufficient. *Twombly*, 550 U.S. at 555 (courts "are not bound to
26 accept as true a legal conclusion couched as a factual allegation.") Regardless,
27 courts have held that "the structure of RESPA's various statutory provisions
28 indicates that Congress did not intend to create a private right of action for purported
RESPA violations...." *See Bloom v. Martin*, 865 F. Supp. 1377, 1384 (N.D. Cal.
1994); *Montoya v. Countrywide Bank, F.S.B.*, 2009 U.S. Dist. LEXIS 53920 (N.D.

1 Cal. 2009). “The absence of a private right of action for purported RESPA
2 violations dooms a purported RESPA claim based on disclosure violations.” *Bloom*,
3 865 F. Supp. at 1384. Thus, Plaintiffs’ argument fails.

4 Lastly, Plaintiffs argue that [t]o the extent Plaintiffs made payments to the
5 LSF9 Master Participation Trust despite the trust’s lack of true ownership of
6 Plaintiffs’ loan, Plaintiffs suffered pecuniary damages in making payments to an
7 entity not entitled to receive payments.” Opp. 9:24-26. However, Plaintiffs’
8 argument is hypothetical in nature. Plaintiffs do not allege that they actually made
9 payments to the LSF9 Master Participation Trust to show they have suffered
10 pecuniary damages; rather, they state “[t]o the extent” they made such payments
11 they suffered pecuniary damages. Opp. 9:24-26. This ambiguous contention is
12 insufficient to challenge BANA’s argument. Indeed, RESPA provides relief for
13 damages only when the damages are pecuniary in nature. *See Allen v. United Fin.*
14 *Mortgage. Corp.*, 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009). Plaintiffs have not
15 sufficiently alleged that they have suffered any pecuniary damages. *See generally*,
16 Compl., Opp. Regardless, if Plaintiffs have suffered any damages, it is due to their
17 own default on the Loan and not due to any alleged act or omission of BANA.
18 Compl., ¶ 34. For these reasons, Plaintiffs’ claim fails as to BANA.

19 **C. Plaintiffs’ Claim for Violation of California Civil Code Section**
20 **2924.17 Fails**

21 In their Opposition, Plaintiffs argue that they have adequately pled a claim for
22 violation of Section 2924.17 because they alleged in the Complaint that “BANA
23 executed and recorded an assignment of deed of trust on November 6, 2014, in
24 which an alleged ‘Assistant Vice President’ of BANA (Michael D. Fitts) – who was
25 actually a Foreclosure Specialist – purported to assign all beneficial interest in
26 Plaintiffs’ Deed of Trust to LSF9 Mortgage Holdings, LLC.” Opp. 10:16-19.
27 However, even if Plaintiffs’ conclusory allegations were accurate — which BANA
28

1 denies — their claim fails because Plaintiffs are not entitled to any relief for such a
2 violation.

3 Plaintiffs are only entitled to relief for a “material violation” of Section
4 2924.17. Cal. Civ. Code § 2924.12(a)(1). Here, Plaintiffs fail to sufficiently allege
5 a “material violation” of Section 2924.17. Not only do Plaintiffs fail allege that the
6 Property has been sold in foreclosure, they do not contest that they defaulted on
7 their Loan. *See generally*, Compl., Opp. Indeed, they merely claim that foreclosure
8 was wrongful because of the alleged assignment to LSF9 Mortgage Holding, LLC.
9 *Id.* Any alleged improper assignment does not change that Plaintiffs defaulted on
10 the Loan and that foreclosure proceedings consequently commenced per the terms
11 under the Deed of Trust. Compl., ¶ 34; RJN, Ex. A. As such, Plaintiffs’ have failed
12 to sufficiently show a “material violation” as required for relief under Section
13 2924.17.

14 **III. CONCLUSION**

15 For the forgoing reasons, BANA respectfully requests that this Court grant its
16 Motion to Dismiss, in its entirety, without leave to amend.

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18
19 DATED: May 17, 2017

MCGUIREWOODS LLP

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21
22 By: /s/ Deleyla A. Lawrence

Deleyla A. Lawrence

23 Attorneys for Defendant Bank of America,
24 N.A.
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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2017, I electronically filed the foregoing document entitled **DEFENDANT’S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS’ COMPLAINT** with the Clerk of the Court for the United States District Court, Northern District of California using the CM/ECF system and served a copy of same upon all counsel of record via the Court’s electronic filing system.

By: /s/ Deleyla A. Lawrence